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FEDERAL COMMUNICATIONS COMMISSION
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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Communications Assistance for) CC Docket No. 97-213
Law Enforcement Act)
)

To: The Commission

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.
REGARDING FURTHER NOTICE OF PROPOSED
RULEMAKING FOR ASSISTANCE CAPABILITY
REQUIREMENTS

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REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.
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Nextel Communications, Inc. ("Nextel") submits these Reply Comments in response to the many comments on the Further Notice of Proposed Rulemaking ("FNPRM") regarding the scope of the Section 103 assistance capability requirements of the Communications Assistance for Law Enforcement Act ("CALEA").¹

Nextel is a broadband Commercial Mobile Radio Service provider of advanced digital communications services. Nextel offers an integrated package of digital wireless services using iDEN® (integrated digital enhanced network) technology

¹ *In the Matter of Communications Assistance for Law Enforcement Act*, CC Docket 97-213 (Released Nov. 5, 1998).

developed by Motorola. This technology combines dispatch radio with full-duplex telephone interconnect, short message service and data communication capabilities.² Motorola is the only manufacturer of the iDEN technology and is the sole source for Nextel's CALEA solutions as well as its other new products and services. As a relatively new entrant to the wireless industry with a unique technology, Nextel especially is concerned about the precedents the Commission will set in these proceedings if the government's broad interpretation of CALEA is adopted.

Indeed, after reviewing the uniform objections to and comments against the so-called punch list proposed by Department of Justice ("DOJ") and Federal Bureau of Investigation ("FBI"), Nextel believes the Commission has been presented a compelling case for rejecting these enhanced surveillance capabilities. Accordingly, Nextel does not provide further legal analysis or comment on that issue.

Rather, Nextel addresses three specific issues. First, Nextel strongly disagrees with the DOJ position that the Commission may not reject the punch list on cost grounds. That is contrary to the plain language of Section 107. Second, Nextel disagrees with DOJ's definition of "reasonable availability" under Section 103. The

² While there is an interconnected Nextel telephony service with the Public Switched Telephone Network ("PSTN"), Nextel's digital Direct Connect service does not connect to the PSTN or rely upon switches to route calls. Direct Connect relies instead on a dispatch architecture. Nextel also provides traditional analog Specialized Mobile Radio service for nearly a half million users.

industry's standard already defines the term correctly and DOJ's proffer would significantly expand the definition and therefore the obligation of carriers to provide more information than CALEA requires.

Finally, Nextel continues to support remand of any required amendments to JSTD-025 to TR45.2, the industry standards setting body. But, the Commission should reject DOJ's proposed, unreasonable conditions on the remand.

I. SECTION 107(b) FACTORS

DOJ argues in its comments that the Commission is limited to determining *how* to implement the punch list, not *whether* to do so.³ DOJ says, regardless of cost, that "[w]hat the Commission may not do . . . is to adopt technical standards that stop short of 'meeting the assistance capability requirements of section 103.'"⁴ To DOJ, cost is only relevant "in choosing among the alternatives" to meet compliance.⁵

First, the Commission need not consider cost or alternatives because, as the overwhelming weight of the comments shows, none of the punch list items are required. But even if the Commission ultimately finds that some of the punch list is required, Section 107(b)(1) provides that the Commission must "meet the assistance

³ DOJ Comments at 11.

⁴ DOJ Comments at 12.

⁵ DOJ Comments at 12.

capability requirements of section 103 by cost-effective methods."⁶ DOJ's argument reads this important limitation out of the statute. On the plain reading of Section 107, if a capability cannot be provided by a cost-effective method, the Commission cannot require it at all. Thus, cost is an important consideration for the Commission in reaching its conclusions in this proceeding.

If there is any ambiguity in the mandate of Section 107(b)(1), the legislative history of CALEA answers. Speaking in regard to the Commission's authority, Congress stated that "if a service of [sic] technology cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed."⁷ If the Commission has the power to permit deployment of technology that cannot meet the Section 103 assistance capability requirements of CALEA at all, it must have the power to permit deployment of technology with some, but not all, of the required surveillance capabilities.⁸ Section 107, on its face, reflects Congress's policy goal of balancing privacy, cost and surveillance needs. The Commission could not, for example, meet the assistance capability requirements by trading off privacy

⁶ 47 U.S.C. § 1006(b)(1) (emphasis added).

⁷ House Report at 3499.

⁸ In making this point, Nextel does not suggest that the punch list is required at all.

concerns in favor of enhanced surveillance features. All of the Section 107(b) factors must be satisfied for any rule to stand.

Moreover, to accept the DOJ proposition could result in the very odd result that the Commission would publish a rule that no carrier could implement due to its cost.⁹ Perhaps recognizing that its cost position is untenable, DOJ also argues that at least the cost of complying with JSTD-025 should not be considered. DOJ says this is so because "[t]he costs of implementing the J-Standard are, for present purposes, "fixed costs."¹⁰ But here again the statute answers the argument because Section 107(b) states that "the Commission [must] establish, by rule, technical requirements or standards" that satisfy the Section 107(b) factors. The Commission's entire final rule, not just the punch list, must be cost-efficient.¹¹

Thus, the Commission must examine the cost of JSTD-025 as well as the punch list to reach its conclusions. Based on initial comments in this proceeding, the cost of implementing JSTD-025 will be in excess of \$4 billion for JSTD-025 alone. Unfortunately, the Commission received no public information on the cost of the

⁹ DOJ Comments at 10. DOJ's answer to this obvious flaw in its reason is to let carriers and the Commission deal with the problem through Section 109 reasonable achievability petitions.

¹⁰ DOJ Comments at 17.

¹¹ The final rule also must protect privacy, promote innovation and competition and minimize the impact on subscriber rates.

punch list. Nextel believes the Commission actually does not need that information now because, based on the enormous cost of JSTD-025 alone, Section 107 should relieve carriers of any further burden.¹² In other words, JSTD-025 alone is the most cost-efficient way of meeting CALEA.

II. DEFINING "REASONABLY AVAILABLE"

Section 103 requires carriers to provide only "reasonably available" call-identifying information.¹³ JSTD-025 states that "[c]all-identifying information is reasonably available if the information is present at an Intercept Access Point (IAP) for call processing purposes."¹⁴ DOJ, however, believes the definition is deficient.¹⁵

The Commission should validate the JSTD-025 definition because the DOJ objections to it are not well-grounded. DOJ argues that JSTD-025 does not require IAPs to be located where they will capture required information.¹⁶ As Nextel reads the standard, it absolutely requires IAPs to be placed to access call content and call-

¹² The record supports that result now without knowing how much more the punch list will add to the final cost.

¹³ 47 U.S.C. § 1002.

¹⁴ JSTD-025 at § 4.2.1.

¹⁵ DOJ Comments at 19-20.

¹⁶ DOJ Comments at 21 ("A carrier "may select IAPs that seriously limit, or even prevent altogether, the collection of call-identifying information").

identifying information.¹⁷ Nextel does not understand how a carrier could be "in compliance with publicly available technical requirements" so as to have a safe harbor if it failed to provision IAPs properly under the standard.¹⁸

DOJ also objects to the JSTD-025 requirement that call-identifying information be present at the IAP for call processing purposes. As Nextel and many other commenters have pointed out, the reason for this limitation is because Congress defined call-identifying information as dialing or signaling information used for "the purpose of routing calls through the telecommunications carrier's network."¹⁹ This is the gravamen of the debate in these proceedings and Nextel continues to urge the Commission to define call-identifying information as Congress intended. If it does so, the JSTD-025 definition will not require any modification.

In sum, the Commission should validate the industry's definition of "reasonably available" call-identifying information without modification. Implicitly, this requires the Commission to accept the definition of call-identifying information provided by Congress rather than the expansive definition proffered by DOJ.

¹⁷ See, e.g., JSTD-025, ¶ 4.4. (call-identifying information IAP will "provide[] expeditious access" to call-identifying information and "may span several functional entities.")

¹⁸ 47 U.S.C. § 1006(a)(2). The remedy for such noncompliance would be an enforcement action under Section 108 of CALEA and remedial action under court supervision.

¹⁹ House Report at 3501.

III. DISPOSITION OF JSTD-025

Nextel continues to support the Commission's proposal to permit TR45.2 to amend JSTD-025, if necessary, to implement the Commission's final rule.²⁰ DOJ, however, claims that a remand would be an improper delegation of the Commission's regulatory authority.²¹ DOJ's claim is based on an incorrect reading of Section 107.

There is no dispute that the Commission must establish technical requirements or standards by rule.²² But, Section 107 does not dictate the level of detail required for technical requirements. Nothing in Section 107 prevents the Commission from following the lead of Congress, which delegated to industry the right to develop detailed standards to implement four general assistance capability requirements.²³

DOJ proposes that the delegation problem can be "minimized" if the Commission requires TR45.2 to present the amended standard "to the Commission, immediately upon its adoption, for review and (if necessary) modification by the

²⁰ FNPRM, ¶ 132.

²¹ DOJ Comments at 31.

²² DOJ Comments at 31.

²³ House Report at 3506-07. The delineation of the four Section 103 assistance requirements was considered by Congress to provide "much greater specificity than found in many delegations upheld by the courts." *Id.* (citations omitted).

Commission itself."²⁴ DOJ's proposal would preempt the industry's ballot and validation process for adoption of a standard, an open process by which industry consensus is achieved.²⁵ Indeed, TR45.2 procedures simply are better suited to develop a standard than a Commission-administered "notice and comment" approach.

Further, even the procedures proposed by DOJ would take at least 90 days after the 180-day amendment cycle proposed by the Commission. Thus, whether or not the Commission or TR45.2 takes comment on the amended standard, a delay of at least three more months beyond the amendment cycle is inevitable.

Nonetheless, DOJ argues that "relying on TR45.2 assistance in the standard-setting process creates a risk of delay that could prejudice the timely implementation of CALEA's assistance capability requirements."²⁶ Nextel appreciates DOJ's concern, but industry always has approached this effort in good faith and there is no reason to believe that TR45.2 would do otherwise on remand.

²⁴ DOJ Comments at 31.

²⁵ See TIA Comments at 10-14.

²⁶ DOJ Comments at 32. DOJ also claims that conditions are needed "to ensure that industry's standard-setting efforts lead to a satisfactory outcome" and because "the balloting process itself could be stretched out almost indefinitely." *Id.* at 33.

IV. CONCLUSION

Nextel continues to urge the Commission to reject the punch list items on substantive legal grounds. Further, the Commission should validate the JSTD-025 definition of "reasonably available." Finally, the Commission can only promulgate a rule that meets all of the Section 107(b) factors; it may not require features that are too costly. If changes in JSTD-025 must be made, it is best that the amendment process be under the auspices of TR45.2.

Nextel asks the Commission should be mindful of the precedents it will set in these proceedings. Future technologies, such as Special Mobile Radio services, will look to the rules set here for guidance. The Commission should heed the sense of Congress that the requirements of CALEA are to be construed narrowly and that the hallmark of CALEA is reasonableness.

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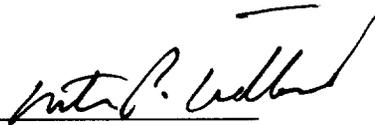
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